IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A. And KHAMIS. J.A.)

CRIMINAL APPLICATION NO. 56/01 OF 2020

GABRIEL KUNG'U KARIUKI.....1ST APPLICANT

JIMMY MAINA NJOROGE @ ORDINARY .....2ND APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Application for review from the decision of the Court of Appeal of Tanzania at Dar es Salaam)

(Mmilla, Mwangesi and Ndika, JJ.A.)

dated 3rd day of July, 2020

in

Criminal Appeal No. 9 of 2016

.....

RULING OF THE COURT

10th & 25th July, 2023

SEHEL, J.A.:

The applicants, Gabriel Kung'u Kariuki and Jimmy Maina Njoroge @ Ordinary, are moving the Court to review its own decision dated 3rd July, 2020, in Criminal Appeal No. 9 of 2016. The motion is preferred under Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 as amended (hereinafter to be referred to as the Rules) and supported by separate affidavits of the applicants. On the other hand, the respondent filed an affidavit in reply to oppose it.

The facts giving rise to the present application are such that; the applicants together with four other persons (co-accused) were arraigned before the Resident Magistrate's Court of Kilimanjaro Region at Moshi, with two counts, to *wit,* conspiracy to commit an offence contrary to section 384 and armed robbery contrary to section 287A both of the Penal Code, Cap. 16. It was particularised in respect of the second count that on the 21st May, 2004 at the National Bank of Commerce (NBC), Moshi branch within the District of Moshi in the Region of Kilimanjaro, the applicants and their co-accused, did steal cash money amounting to TZS. 5,319,777,722.82 the property of the NBC, and immediately before or immediately after the time of such stealing, they used offensive weapons to *wit;* firearms and knives to threaten bank officials and customers in order to obtain and retain the stolen property. They all denied the charges levelled against them and raised defences of alibi.

After a full trial, the learned trial Resident Magistrate held each of the applicants herein and their co-accused culpable to both counts, and sentenced each to concurrent sentences of two years' imprisonment and thirty years' imprisonment, for first and second count respectively.

The applicants and their co-accused were aggrieved by that decision and appealed to the High Court. Their appeal partly succeeded

in that their conviction on the first count was quashed and sentence set aside while the conviction and sentences on the second count were upheld. They thus appealed further to the Court. The decision of the Court, which is subject to this review, dismissed the applicant's appeal and upheld the decisions of the two lower courts. The applicants have thus come for the second time beseeching the Court to review its own decision on the following grounds:

1. *That, the decision was based on a manifest error on the face of record resulting into the miscarriage of justice in that;*

   (i) The decision of the court was based on the evidence of PW5, PW6, PW7 and PW8 yet none of the witnesses had laid down well established antecedents of visual identification as there was no prior description of the applicants given and none of the said witnesses testified on the role played by the applicants in the commission of the crime.

   (ii) The Court relied on the evidence of PW7 to uphold the applicants' conviction while the same is not borne out of the record as PW7 neither identified the 2nd applicant nor had the lower courts based the conviction of the 2nd applicant on this evidence.

(iii) There was gross misdirection when the Court held that visual identification made against the 1st applicant by PW5, PW6 and PW18 was watertight.

(iv) The Court failed to adjudicate on the complaint about the witnesses who participated in the identification parade being allowed to communicate with those who were not yet which was a violation of the PGO on the parade rules.

(v) The court did not properly determine the ground which was to the effect that there was double standard as the evidence of PW6 and PW18 on visual identification which was used to acquit David Ngugi Mburu was used against the 1st applicant.

(vi) There was a serious misdirection in the impugned judgment as the ground on double standard was found meritorious in respect of the 1st applicant but the Court rejected the same ground by the 2nd applicant despite the fact that the same witness (PW18) had identified him and David Ngugi Mburu under the same circumstances.

2. The applicants were wrongly deprived of an opportunity to be heard, in that:

(i) The Court in its decision failed to adjudicate the 4th ground raised by the applicants in the memoranda of appeal.

(ii) The Court failed to adjudicate the issue of mitigation as clearly stated in the applicants' memoranda of appeal."

At the hearing of the application, the applicants appeared in person and fended for themselves whereas Ms. Brenda Nicky Masawe, learned Senior State Attorney assisted by Ms. Jesca Massae, learned State Attorney, appeared for the respondent/Republic.

Having adopted the joint written arguments and the list of authorities, the 1st applicant opted to hear the respondent's reply to the application and reserved his right to re-join, if need would arise but the 2nd applicant opted to highlight some few issues submitted in the arguments. He pointed out that the Court misdirected itself by holding that PW7 identified him as among the passengers he shuttled from Arusha to Nairobi while the evidence of the said witness before the trial court was to the effect that at no particular time, he identified him. He contended further that, although, at page 35 of the judgment, the Court agreed that there was double standard as the David Ngugi Mburu whom they were identified together was acquitted but went ahead to uphold

their conviction and sentence. It was his submission that such holding was an error which caused miscarriage of justice to them. To buttress his argument, he referred us to page 5 of our previous decision in the case of **Peter Kindole v. The Republic,** Criminal Application No. 3 of 2011 [2013] TZCA 465 (6 August, 2013; TANZLII).

Ms. Massae replied to the application on behalf of the Republic. She was very brief and focused. She made a general submission to all grounds fronted by the applicants in their notice of motion. She contended that the grounds advanced by the applicants were the same grounds raised in their appeal which were adequately considered and determined by the Court. She pointed out that issues of double standard and identification of the applicants were well canvassed and determined by the Court at pages 35 and 38 - 39 of the impugned judgment respectively.

The learned State Attorney argued further that for an error to fall within the purview of Rule 66 (1) (a) of the Rules, it must be apparent on the face of the record and must have occasioned a miscarriage of justice to the applicants, which, she said, is not the case in this application. According to her, the applicants' application has no basis as

it does not meet the criteria provided under Rule 66 (1) (a) and (b) of the Rules. She therefore implored us to dismiss the application.

In his rejoinder, the 1st applicant repeated the submission made by the 2nd applicant that the Court applied double standard in respect of the identification made by PW7. He thus beseeched us to find that, that was an error on the face of the record occasioning a miscarriage of justice to him and prayed for the application to be allowed.

The 2nd applicant in his rejoinder reiterated his earlier submission and invited the Court to find merit in the application.

Having heard the oral submissions and gone through the motion, the supporting and reply affidavits as well as the written submissions, the issue that stands out for our determination is whether the grounds advanced by the applicants justify the review of the Court's decision.

The power of the Court to review its own decisions is provided for under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141. Further, the grounds upon which a party may successfully apply for review are stated under Rule 66 (1) of the Rules that provides as follows:

> *"66 (1) The Court may review its judgment or order,* ***but no application for review shall be entertained except on*** *the following grounds -*

(a) *the **decision** was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*

(b) *a party was wrongly deprived of an opportunity to be heard;*

(c) *the Court's decision is a nullity;*

(d) *the Court had no jurisdiction to entertain the case; and*

(e) *the judgment was procured illegally, or by fraud or perjury."*[Emphasis added].

As we have stated earlier, the applicants pegged their application for review under sub-rule (1) (a) and (b) of Rule 66 of the Rules where they alleged that the judgment of this Court dated 3rd July, 2020 was based on manifest error on the face of the record that resulted into a miscarriage of justice and the applicants were wrongly deprived of an opportunity to be heard.

We shall start with the complaint regarding manifest errors on the face of record that resulted into miscarriage of justice to the applicants. What constitutes a manifest error apparent on the face of record has been well defined by the Court in the case of **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 where it adopted the excerpts from MULLA, 14th Edition that:

"An error apparent on the face of the record must be such that can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions.... A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is not ground for ordering review.... It can be said of an error that is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established..."

Further, in the case of **Tanganyika Land Agency Limited & 7 Others v. Manohar Lal Aggrawal**, Civil Application No. 17 of 2008 (unreported) we explained on the ingredients of rule 66 (1) (a) that:

".....the ingredients of an apparent error are that first, there ought to be an error; second, the error has to be manifest on the face of the record, and third the error must have resulted in miscarriage of justice."

Applying the above to the present application, we find ourselves inclined to the submission of the learned State Attorney that the issues of identification and double standard submitted by the applicants cannot, by any stretch of imagination, be termed as manifest errors on the face

of the record resulting in the miscarriage of justice. We say so because the issue of identification and double standard were raised in the appeal, the Court thoroughly considered them and at the end, it did not find merit in the respective grounds. By bringing similar complaints in this application means that the applicants were not satisfied with our findings on the issue of identification and double standard. They want this Court to sit on appeal against its own judgment which is not permitted by the law and does not fall within the scope of its powers under Rule 66 (1) of the Rules. Mere disagreement with the view of the judgment cannot be the ground for invoking the review powers. So long as the issues were already dealt with and decided by the Court, the applicants are not entitled to challenge the judgment in the guise that an alternative view is possible under the review jurisdiction.

In the case of **Shadrack Balinago v. Fikiri Mohamed @ Hamza & 2 Others**, Civil Application No. 25/8 of 2019 [2021] TZCA 45 (25 February, 2021; TANZLII), the Court stressed on the position that a mere dissatisfaction with a court's decision does not constitute an apparent error on the face of record, by stating that:

> *"Such a ground is unacceptable, as it amounts to asking the Court to sit in its own appeal. Where an applicant for review is dissatisfied with the judgment*

of the court, the said fact is not sufficient to deserve a review of the judgment of the Court. The judgment of the court may contain some minor errors here and there, ... but that is not a justification for seeking review".

In the event, we find that the first ground is devoid of merit as it is not a ground for review.

In the second ground of review, the applicants are complaining that they were wrongly deprived of an opportunity to be heard, **first**, that the Court failed to adjudicate on the 4th ground of appeal in their memorandum of appeal and **secondly,** that the Court did not consider and adjudicate on the issue of mitigation. We have gone through the impugned judgment and what we gather is that none of the applicants said anything or submitted on the said 4th ground of appeal. Despite that fact, we noted that the Court subjected the entire evidence on record to its further scrutiny and at the end, it did not find any justifiable reason to disturb the concurrent findings of the two courts below.

We now turn to the complaint that the Court did not consider and adjudicate on the issue of mitigation. Having revisited the impugned judgment, the issue of mitigation was not among the grounds of appeal of the applicants, it was only Wilfred Onyango and Simon Ndungu who

raised such a complaint in the appeal. Therefore, the complaint by the applicants that the Court did not consider the complaint is unfounded. The second ground also fails.

Lastly, we wish to echo what we said in the case of **Patrick Sanga v. The Republic**, Criminal Application No. 8 of 2011 [2013] TZCA 473 (05 August, 2013; TANZLII) that review is an exceptional remedy, that:

> *"The review process should never be allowed to be used as an appeal in disguise. There must be an end to litigations, be it in civil or criminal proceedings. A call to re-assess the evidence, in our respectful opinion, is an appeal through a back door. The applicant and those of his like who want to test the Court's legal ingenuity to the limit should understand that we have no jurisdiction to sit on appeal over our own judgments. In any properly functioning justice system, like ours, litigation must have finality and a judgment of the final court in the land is final and its review should be an exception. That what sound public policy demands."*

From what we have discussed, we are inclined to the submission of Ms. Massae that the two grounds advanced by the applicants do not fit within the dictates of Rule 66 (1) of the Rules.

We therefore find no merit in the entire application. Accordingly, we proceed to dismiss it.

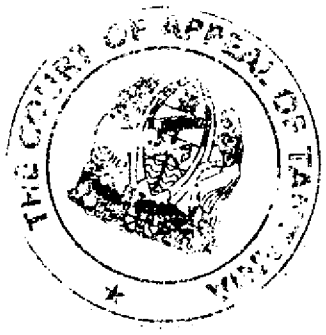
DATED at **DAR ES SALAAM** this 21st day of July, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 25th day of July, 2023 in the presence of the Applicants in person and Mr. Adolf Kissima, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL